90-1922

Supreme Court, U.S.
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No.

In The
UNITED STATES SUPREME COURT
October Term 1990

GEORGE W. SCHMIDT,

Petitioner,

vs.

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and Human Services,

Respondent.

On Petition for Writ of Cerrtiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether, once the Court of Appeals found that Plaintiff could no longer perform his past work, it was error of law for the Appellate Court to hold, *sua sponte,* that Plaintiff could perform the job of "cashier in a retail store," despite the fact that the Social Security regulations shift the burden of proof at this point to the Secretary to determine what work the Plaintiff can do considering his residual functional capacity, age, education, and work experience.

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ADMINISTRATIVE AND COURT DECISIONS

On January 29, 1988, Administrative Law Judge John L. Mondi issued a written decision on Plaintiff's disability application under Title II of the Social Security Act, finding Plaintiff not disabled. Plaintiff requested review of the hearing decision with the Secretary's Appeals Council. On May 19, 1988, the Appeals Council affirmed the decision of the ALJ causing it to become the final administrative decision. Plaintiff thereafter commenced an action in the United States District Court for the Northern District of Illinois for judicial review of the Secretary's final decision. Plaintiff and the Secretary filed cross-motions for Summary Judgment. On May 19, 1989, U. S. District Judge James F. Holderman denied Plaintiff's Motion for Summary Judgment and affirmed the decision of the Secretary of Health and Human Services. On June 5, 1989, Plaintiff filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Plaintiff's motion was denied on October 19, 1989.

Thereafter on December 22, 1989, Plaintiff filed an appeal of the order affirming the Secretary's denial of benefits with the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. Section 1291. The Court dismissed the appeal because it was filed after 60 days had expired. Plaintiff filed a motion with the U. S. District Court explaining that he included 3 days for mailing the decision in calculating the time to appeal pursuant to Rule 6 (e) of the Federal Rules of Civil Procedure. Judge Holderman found that this inadvertent error on Plaintiff's part constituted "excusable neglect" and granted a three day extension of time to file a notice of appeal. Plaintiff's Notice of Appeal was therefore filed on December 22, 1989, in accordance with Rules 4(a) and (d) of the Federal Rules of Appellate Procedure. In a published opinion dated October 1, 1990, the Seventh Circuit affirmed the District Court's decision. *Schmidt v. Sullivan,* 914 F.2d 117 (7th Cir. 1990), Appendix, at

1. Plaintiff filed a timely Petition for Rehearing with Suggestion for Rehearing *In Banc* on October 15, 1990. The Seventh Circuit denied this Petition on December 11, 1990.

JURISDICTION

Plaintiff seeks to have this Court review the Circuit Court's final order of October 1, 1990, which affirmed the District Court's decision affirming the Secretary's denial of social security disability benefits. Plaintiff filed a timely Petition for Rehearing with Suggestion for Rehearing *In Banc*. This Petition was denied on December 11, 1990. On February 26, 1991, Plaintiff requested an extension of time to file his Petition for Writ of Certiorari until May 10, 1991. The request for an extension was granted by this Court in an Order dated March 5, 1991. Petitioner brings this Petition pursuant to 28 U.S.C. Section 1254(1).

STATUTES UNDER REVIEW

Section 205(g) of the Social Security Act, 42 U.S.C. Section 405 (g) states:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commended within sixty days after the mailing to him of a notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any judicial district, in the District Court of the United States for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...

The Social Security Act, 42 U.S.C. Section 423(d)(1)(A) and (2)(A) and (B), provides:

> (1) The term "disability" means -
> (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;

(2) For purposes of paragraph (1)(A) -

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

The Secretary's regulations at 20 C.F.R. Section 404.1520 (a)-(f) provide:

(a) Steps in evaluating disability.

We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If your are not doing substantial gainful

activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) If you are working.

If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) You must have a severe impairment.

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will consider your age, education, and work experience. However, it is possible for you to have a period of disability for atime in the past even though you do not now have a severe impairment.

(d) When your impairment(s) meets or equals a listed impairment in Appendix 1.

If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) Your impairment(s) must prevent you from doing past relevant work.

If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing any other work.

(1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

STATEMENT OF THE CASE

Plaintiff applied for social security disability insurance benefits under sections 223 and 216(i) of the Social Security Act on October 17, 1986, alleging disability since March 28, 1986, due to a cardiac condition, hypertension, and a blocked carotid artery. This application was denied initially and upon reconsideration. Plaintiff requested a hearing which was held before Administrative Law Judge ("ALJ") John L. Mondi on October 8, 1987. In addition to the Plaintiff, a Vocational Expert ("VE"), Susan Entenberg, was called upon to testify at the request of the ALJ.

Plaintiff testified that he was born on April 25, 1925 and was 62 years of age at the time of the hearing. Until 1986, Plaintiff held high-level executive positions with a variety of companies. In 1977, Plaintiff suffered a myocardial infarction. He had two lengthy stints with Montgomery Wards, eventually working as a Senior Vice President in charge of over one hundred retail outlets. His job was very stressful and required working up to sixty hours a week. Plaintiff was experiencing frequent episodes of angina and he testified that he was unable to keep up with the demands of executive management. After leaving Wards, he served as President of a Wick's Furniture subsidiary from January through November 1982, working up to fifty hours a week. In order to slow down his work pace, Plaintiff opened his own consulting firm which proved to be very successful. However, on March 29, 1986, Plaintiff suffered a transient cerebral ischemic attack ("TIA") and his deteriorating health caused him to stop working.

On January 29, 1988, the ALJ denied Plaintiff's claim for benefits, finding Plaintiff could return to his past relevant work as a corporate executive. (Hearing Decision, Appendix, at 24). Plaintiff filed a Request to Review Hearing Decision with the Appeals Council and on May 19, 1988, the Appeals Council denied the request, causing the ALJ's decision to become the

final decision of the Secretary. Plaintiff then filed a Complaint requesting judicial review in the District Court for the Northern District of Illinois, Eastern Division, on June 7, 1988. On May 19, 1989, Judge James F. Holderman denied Plaintiff's Motion for Summary Judgment and affirmed the Secretary's denial of benefits. *Schmidt v. Sullivan,* 88 C 4964 (N.D. Ill. 1989). (Appendix, at 6). The District Court held that the ALJ's decision finding that Plaintiff could perform his past work as a corporate executive was supported by substantial evidence.

Thereafter Plaintiff filed an appeal of the Order affirming the Secretary's denial of benefits with the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. Section 1291. In a decision dated October 1, 1990, the Seventh Circuit affirmed the District Court and upheld the Secretary's denial of disability benefits. *Schmidt v. Sullivan,* 914 F.2d 117 (7th Cir. 1990). (Appendix, at 1). However, in doing so, the Court reversed the ALJ's finding that Plaintiff could perform his past work as a corporate executive. The Court held that the record unequivocally showed that emotional stress precluded Plaintiff from performing his past work because it provoked angina pectoris. However, the Court then stated that Plaintiff could perform "a variety of sedentary jobs, provided they are not stressful." *Schmidt v. Sullivan, supra,* at 119. As an example the Court named the job, *sua sponte,* of "cashier in a retail store." *Ibid.* Plaintiff filed a timely Petition for Rehearing with Suggestion for Rehearing *In Banc* and a supporting memorandum arguing that at the fifth step of the Secretary's sequential evaluation, Plaintiff must be found disabled. Without further opinion the Court of Appeals denied the motion on December 11, 1990.

ARGUMENT

Plaintiff asserts that the Appellate Court's finding that Plaintiff cannot perform his past work requires, as a matter of law, that the case be remanded for the next step in the sequential evaluation. This case warrants review by this Court under Supreme Court Rule 10.1 (a) and (c). The Circuit Court's decision departs greatly from the manner in which the Secretary applies his own regulations and rulings, which shifts the burden of proof from the claimant to the Secretary at Step 5 of the "sequential analysis." It also conflicts with this Court's decision in *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983), which upheld the Secretary's Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Reg. No. 4, Appendix 2, ("Grid rules"). Moreover this decision, which ignores the recognized application of Step 5, conflicts with other circuit court decisions as well as cases within the Seventh Circuit.

I. The Circuit Court Misapplied the Secretary's Five Step "Sequential Analysis"

The Secretary is granted the statutory authority to promulgate uniform standards, by regulation, to determine when individuals are disabled. 42 U.S.C. Section 405(a) (1983). In *Heckler v. Campbell*, this Court upheld the Secretary's use of the grid rules as a valid use of its rule-making authority. Pursuant to this statutory authority, the Secretary has prescribed a five-step sequential evaluation process for determining disability. *See* 20 C.F.R. Section 404.1520(a)-(f).

First, the claimant must show that he is not performing any substantial gainful activity ("SGA"). If the claimant is not performing SGA, the second step requires the claimant to show that his impairment is "severe." This severity test is a *de minimis* one, requiring only a showing that the impairment affects the claimant's ability to perform past work more than

slightly. The *de minimis* standard has been upheld by the Supreme Court in *Yuckert v. Bowen*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). If the impairment is more than slight, the third step determines whether the impairment meets or equals an impairment acknowledged by the Secretary as being disabling. The Listing of Impairments is found at 20 C.F.R. Part 404, Subpart P, Reg. No. 4, Appendix 1. The fourth step requires a determination as to whether the claimant can return to his past work if the claimant's impairment does not meet or equal the step three listings. The claimant bears the burden of showing that he can no longer perform his past work. *Rhoderick v. Heckler*, 737 F.2d 714 (7th Cir. 1984). If successful, the fifth and final step shifts the burden of proof to the Secretary to establish that the claimant can perform other work. *Tom v Heckler*, 779 F.2d 1250, 1252-53 (7th Cir. 1985); *McNeil v. Califano*, 614 F.2d 142, 145 (7th Cir. 1980). Ordinarily, the Secretary may refer to the Grid rules unless the claimant suffers from a nonexertional impairment or transferability of work skills is an issue. If so, the Secretary must establish that, despite the claimant's limitations, the claimant can perform jobs which exist in significant numbers in the national economy. Appendix 2, Section 200.00(c); *Heckler v. Campbell, supra*, 461 U.S. at 462 n.5; *Warmoth v. Bowen*, 798 F.2d 1109 (7th Cir. 1986); *Smith v. Schweiker*, 735 F.2d 267 (7th Cir. 1984). The Secretary's decision must be supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept to support a conclusion." *Richardson v. Perales*, 402 U.S. 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

In the present case the ALJ ended his inquiry at Step 4 when he found Plaintiff capable of performing his past work. However, once the Seventh Circuit reversed the ALJ's Step 4 finding, it was error for the Court to proceed to Step 5 rather than remand to the Secretary for a *de novo* Step 5 determination as the law requires. As this Court noted in *Heckler v. Campbell, supra*, 461 U.S. at 460-461, the regulations direct the

Secretary to consider the factors Congress has identified as relevant: physical ability, age, education, and work experience.

> The regulations state that the Secretary will inquire into each of these factors and make an individualized assessment of each claimant's abilities and limitations. See 20 CFR Sections 404.1545-404.1565 (1982); cf. 20 CFR Section 404.944. In determining a person's physical ability, she will consider, for example, the extent to which his capacity for performing tasks such as lifting objects or his ability to stand for long periods of time has been impaired. See Section 404.1545.

Id. at 460-461, n.1. Thus the ALJ is required by regulation to make a residual functional capacity ("RFC")[1] assessment in order to ascertain the demands of claimant's past work and to compare these demands with the claimant's present physical abilities. *See Strittmatter v. Schweiker*, 729 F.2d 507, 509 (7th Cir. 1974).

In the present case, the ALJ found at Step 4 that Plaintiff could return to his past "sedentary" work.[2] The Court of Appeals reversed the ALJ's finding that Plaintiff could return to his past work as a corporate executive but implicitly allowed the ALJ's comment, albeit "without elaboration," that "[t]he

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[1]Residual functional capacity is the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs. Appendix 2, Section 200.00(c); 20 C.F.R. Section 404.1545.

[2]Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying small articles. While sedentary jobs involve mostly sitting, walking and standing are required occasionally. The definition of "occasionally" ranges from very seldom to up to one-third of the time. Therefore, sedentary work should not require standing or walking any more than about two hours of an eight-hour workday and sitting should total approximately six hours of the eight-hour workday. *See* 20 C.F.R. 404.1567(a) and Social Security Ruling 83-10 (Cumulative Edition 1983) at page 179.

vocational expert testified that he [Plaintiff] would have transferable skills to somewhat less stressful jobs," to satisfy the Step 5 requirements. *Schmidt* at 119. The Court then concluded, *ipse dixit*, that there must be sedentary low stress jobs for educated claimants in their sixties and the Court named the job of "cashier in a retail store" as an example of such a job. The Court commented:

> With support from the testimony given by a job expert, he made a finding, although without elaboration, that Schmidt could find employment in a less stressful white collar job. There is little doubt that this is true.

Schmidt, at 119. Ironically, at bar, the VE's testimony was *not* supportive of a finding that Plaintiff could perform a variety of sedentary jobs. At the hearing the VE testified that Plaintiff has transferable skills but only to "lesser degrees of management" and that stress is "inherent to management." (Appendix, at page 37). No examples of low stress non-managerial jobs were named by the VE, as they must to satisfy Step 5 of the sequential evaluation. 20 C.F.R. Section 404.1566(e).

In reaching its decision the Court held that Plaintiff should be capable of performing less stressful low-end work such as a "cashier in a retail store." However, there is no such job classification in the Dictionary of Occupational Titles as a "cashier in a retail store." A retail sales person is classified as "light" in exertion and a "cashier" is classified as sedentary. *See* U.S. Department of Labor, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (1981) at pages 243 and 225, respectively. Even if Plaintiff has transferable skills to a job in retail sales there must first be a finding that he is capable of "light" exertion, a finding not made in this case. *See* Social Security Ruling 82-41 at page 201, para. 4 a. (Cumulative Edition 1982). While the job of "cashier" is "sedentary" in exertion, in order to find Plaintiff not disabled there must first be a finding, based upon testimony of a VE, that Plaintiff has "highly marketable skills" that are "readily

transferable" to the job of cashier, also not done in this case. 20 C.F.R. 404.1563(d); Appendix 2, Sections 201.00(d), (e) and (f). In fact the VE at the hearing testified that Plaintiff has no transferable skills outside of management positions. (Appendix, at page 41).

The ALJ's failure to "elaborate," that is, name the jobs an individual with claimant's profile can perform, is precisely the error in this case. *Schmidt*, at 119. The ALJ opined that Plaintiff could work at less stressful management jobs. The ALJ may have intended this to be a Step 5 determination; however there is no doubt that as a Step 5 finding, the ALJ's mere reference to other management jobs was inadequate for two reasons. First, according to the VE, for a person with Schmidt's personality characteristics, even lower level management jobs would be too stressful. (Appendix, at page 42). Second, the VE failed to cite the incidence of such jobs in the economy, which is required by the regulations and rulings.[3] 20 C.F.R. Section 404.1566; SSR 83-13 (Cumulative Edition 1983) at pages 195-96. More importantly for purposes of this Petition, it appears that the Appellate Court rejected the notion that Plaintiff could perform lesser level management jobs based on his reaction to stress as provoking angina attacks because the Court named non-managerial jobs, such as cashier, as an example of a job that Schmidt could perform.

A reviewing court has no authority to make decisions on vocational issues *ab initio*. Commenting on this the court in *Kuwahara v. Sullivan*, 677 F. Supp. 553, 562 (N.D. Ill. 1988) held:

> Appellate courts properly frown on efforts to take judicial notice of the availability of jobs with specific vocational requirements (*Kirk*, 667 F.2d at 536-37 n.7; *Wilson v.*

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[3]Once published, a Social Security Ruling ("SSR") is binding on all components on the Social Security Administration in accordance with Section 422.408 of the Social Security Regulations. *Lichter v. Bowen*, 814 F.2d 430, 434, n.5 (7th Cir. 1987).

> *Califano*, 617 F.2d 1050, 1053-54 (4th Cir. 1980)). This court has no desire to play armchair vocational expert.

In *Kirk v. Secretary of Health and Human Services*, 667 F.2d 524, 537 n.7 (6th Cir. 1981), the court quoted *O'Banner v. Secretary of Health, Education & Welfare*, 537 F.2d 321, 323 (6th Cir. 1978) in stating:

> 'The scope of review requires that there be something more than mere intuition or conjecture by the administrative law judge' before he concludes that jobs are available. This same line of reasoning applies to the Appellate Court in this case.

The decision at bar departs and conflicts not only with longstanding decisions from other circuits but the Seventh Circuit as well. In *Walker v. Bowen*, 834 F.2d 635, 640 n.3 (7th Cir. 1987), the Seventh Circuit stated: "This burden of shifting at Step 5 is not statutory, 'but is a long standing judicial gloss on the Social Security Act.'" The Eighth Circuit has reaffirmed its position on this issue on a number of occasions, see, *e.g.*, *Bradshaw v. Heckler*, 810 F.2d 786, 789 (8th Cir. 1987); *Lanning v. Heckler*, 777 F.2d 1316, 1316-17 (8th Cir. 1985). Therefore, allowing *Schmidt* to stand as decided departs greatly from established precedent as well as the Secretary's own regulations.

In its decision, the Seventh Circuit did not consider the law applicable to Step 5 of the sequential analysis, which requires VE testimony regarding transferability of the claimant's skills, consideration of the nonexertional impairment and the incidence of jobs, if any, the claimant can perform. 20 C.F.R. Section 404.1566 (d); SSR 83-13 (Cumulative Edition 1983) at pages 195-96. The law is clear, a reviewing court may not go outside of the record and name jobs a claimant may transfer to *sua sponte*. 42 U.S.C. Section 405(g).

II. A Significant Nonexertional Impairment Requires An Individualized Assessment

By naming a sedentary low-end job it believed Plaintiff could perform, the Seventh Circuit recognized this case required an individualized assessment rather than application of the Grid rules at Step 5. Appendix 2, Section 200.00(e)(2). In *Smith v. Schweiker, supra*, at 271, the Seventh Circuit stated:

> The purpose of the Guidelines is to facilitate establishing that there are a substantial number of jobs in the economy which a person with the impaired capacity (and other characteristics) can perform. It seems obvious that the smaller the range of sedentary jobs a person is physically able to perform, the less valid the proposition that the Guidelines reflect a substantial number of jobs the person can perform.

At bar, the Court focused primarily on Plaintiff's nonexertional stress in making its determination. The Court noted that the medical evidence demonstrating that Plaintiff suffered angina pain from emotional stress was uncontradicted in the record. The Court held:

> Attacks of angina pectoris-the chest pains that are the symptoms of coronary artery disease-can be brought on by psychological stress as well as by physical exertion, The Heart: Arteries and Veins 1174 (Hurst, *et al.*, eds. 1978), and people's sensitivity to different forms of strain differs. *Id.* Moreover, "angina pectoris provoked by emotional tension will sometimes last longer than angina pectoris provoked by effort because one cannot control emotions as easily as one can control physical activity." Id. at 1175. Apparently Mr. Schmidt reacts worse to the kind of psychological stress that he experienced when he held responsible managerial positions than he does to the physical exertion involved in a slow game of handball. So at least the evidence of his treating physician indicates, and there is no contrary evidence. The award of benefits to a person disabled because the emotional stress of working

> would exacerbate his heart condition would not even be novel. *Stewart v. Heckler*, 730 F.2d 1065 (6th Cir. 1984).

Schmidt, supra, at 118-19.

Thus the Court held that the unequivocal medical evidence demonstrated that Plaintiff experienced angina pain from emotional stress. The Court reversed the ALJ's finding that Plaintiff could perform his past work due to emotional stress, making clear that Plaintiff has a significant nonexertional impairment. This finding alone requires an individualized assessment under the Medical-Vocational Guidelines. *See* Appendix 2, Section 200.00(e)(1) and (2). Accordingly, under the law, it becomes incumbent upon the *Secretary*, not the Court, to produce evidence of sedentary jobs Plaintiff can perform that exist in significant numbers.

III. Vocational Testimony Identifying Plaintiff's Transferable Skills and Giving the Incidence of Other Jobs He Could Perform are Critical Components of a Step 5 Determination.

Social Security Ruling 82-41 requires the assistance of a VE to determine whether Plaintiff has transferable skills to other types of employment. The Ruling provides:

> When a finding is made that a claimant has transferable skills, the acquired work skills must be identified, and specific occupations to which the acquired work skills are transferable must be cited in the .. ALJ's decision.

Id. at page 204, para. 6. In Plaintiff's case, the regulations require a person of advanced age to have skills that are "readily" transferable and "highly marketable" to jobs at the skilled or semi-skilled levels. Skills which are readily transferable or highly marketable require "very little, if any, vocational adjustment. . .in terms of tools, work processes, work settings, or the industry." Appendix 2, Sections 201.00(d), (e) and (f); 20 C.F.R. Section 404.1563(d). *See also Tom v. Heckler*, 779 F.2d 1250, 1255 (7th Cir. 1985) and *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).

Social Security Ruling 82-41 also requires that medical factors shall be considered when making decisions involving transferability of skills:

> All functional limitations included in the RFC (exertional and nonexertional) must be considered in determining transferability ... These factors [nonexertional] as well as the general capacity to perform a broad category of work (e.g. sedentary, light or medium) must be considered in assessing whether or not a claimant has transferable work skills.

Id. at page 202, para. 4 b.

In its decision, the Seventh Circuit did not consider the law applicable to Step 5 of the sequential analysis which requires that jobs must first be identified by a vocational expert for a proper Step 5 determination. This same scenario occurred in *Christensen v. Bowen*, 633 F. Supp. 1214, 1221-22 (N.D. Ca. 1986). The court held:

> In his memorandum decision, the ALJ found that, '[w]hile the claimant's depressive symptoms might be exacerbated by a return to the level of responsibilities and pressures involved in his most recent work for Sears, he could perform other supervisory, managerial, or even lower level work without the unusually high level of stresses and pressures in his past work.'

Reversing the ALJ's decision, the court commented:

> Such a generalized finding, however, does not satisfy the requirement, under the law of this Circuit, that the Secretary make specific findings showing that there is other substantial activity that the claimant can perform.

Id. at 1222. The court referred to the decision in *Hall v. Secretary of Health, Education & Welfare*, 602 F.2d 1372, 1377 (9th Cir. 1979) wherein the Ninth Circuit opined that a VE, not the ALJ, must testify to the incidence of jobs:

> It is incumbent on the Secretary at a *minimum*, to come forward with specific findings showing that the claimant has the physical *and mental* capacity to perform *specified*

> jobs, taking into consideration the requirements of the job as well as the claimant's age, education and background (emphasis in the original).

This same rationale applies to the reviewing court, which must render a decision on the record and not make *de novo* findings. 42 U.S.C. Section 405(g).

In the present case, the record did not contain evidence of jobs that Plaintiff could be reasonably expected to transfer to at his age and with his work experience and RFC. Transferring to other jobs was not at issue on review. Only the step 4 issue of whether substantial evidence supported the Secretary's finding that Plaintiff's impairment was exertional as opposed to nonexertional, was before the Appellate Court. On the merits, the ALJ held that Plaintiff's RFC permitted him to perform his past sedentary work as a corporate executive. Appendix, at page 37. The Court affirmed the finding that Plaintiff was limited to "sedentary" work but reversed the ALJ and held that Plaintiff did indeed suffer from a significant nonexertional impairment rendering him incapable of returning to his past work. However the Court reasoned that because Plaintiff is an educated person, "[r]elatively little troubled by physical exertion, he can work in a variety of sedentary jobs, provided they are not stressful" and that "[o]f such jobs there is no scarcity for educated people even in their sixties, at least not so acute a scarcity as would support a finding that a person was disabled from gainful employment", is clearly erroneous. *Schmidt, supra*, at 119. The Court held that Plaintiff does have a significant nonexertional impairment and the VE testified that Plaintiff's skills transferred only to other management positions, all of which have some degree of stress. Hence, it is clear that under the law this case must be remanded for an individualized Step 5 assessment taking into consideration the Appellate Court's finding that Plaintiff has a nonexertional impairment. Therefore, the Court's analysis conflicts with the Secretary's sequential analysis at Step 5 and for this reason the case must be remanded for a proper Step 5 determination.

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CONCLUSION

The issue on review was whether Plaintiff's nonexertional limitation, angina pain as the result of emotional rather than physical stress, precluded him from performing stressful work as a corporate executive. The Court agreed with Plaintiff's position on this issue and reversed the ALJ's finding. Once this occurred the well-established law requires that the case must be remanded for the Secretary to elicit further vocational evidence as to whether there are jobs Plaintiff can transfer to considering his RFC, age, education, past work, and nonexertional impairment.

In reviewing the ALJ's decision, the Seventh Circuit failed to properly apply the law. In fact, the analysis that Plaintiff can perform other "sedentary" work, citing as an example the job of "cashier in a retail store," is expressly contrary to the law. The Court, having failed to properly apply the sequential analysis after reversing the ALJ's decision that Plaintiff could perform his past work, committed reversible error that requires remand for further development by the Secretary at Step 5. It was legal error for the Court to misapply the sequential evaluation process instead of remanding to the Secretary for a proper Step 5 analysis. Obviously, both the Secretary and the courts must follow the directives of the Secretary's own rules. While the parties did dispute the issue of nonexertional stress, which the Court overturned, the Step 5 issue of transferring skills to other jobs that exist in significant numbers was not before the Court and was not argued by the parties. Nevertheless, once the Court made it an issue, the appropriate remedy under the law was to remand this case to the Secretary for *de novo* Step 5 development.[4]

---

[4]Following its own regulations is the least Mr. Schmidt can expect from his government. Plaintiff is a decorated soldier

(continued...)

Accordingly, the Circuit Court's finding, *ipse dixit*, that the evidence pointed to a conclusion that Plaintiff could perform the job of "cashier in a retail store" is at odds with decisions by this Court, all circuit courts that have dealt with the issue, including the Seventh Circuit, and the Secretary's sequential analysis at Step 5. It is clear the Court committed legal error and remand is the appropriate remedy.

Respectfully submitted,

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Attorney for Petitioner

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[4](...continued)
who fought in two wars for his country. (Appendix, at page 39). He was a contributing member of society his whole adult life until forced to stop working due to his deteriorating health at age 62. The Secretary must agree to voluntarily remand this case to properly apply his own regulations. A voluntary remand would demonstrate that the Secretary is interested in justice and fair-play in these nonadversarial matters.

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3766

GEORGE W. SCHMIDT,

Plaintiff-Appellant,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 4964—**James F. Holderman**, *Judge.*

ARGUED JULY 12, 1990—DECIDED OCTOBER 1, 1990

Before CUDAHY and POSNER, *Circuit Judges*, and PELL, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* This is an appeal from the judgment of the district court refusing to disturb the denial of social security disability benefits to the plaintiff. The plaintiff, who is now 65 years old, suffers from coronary artery disease. (Because of his age, his entitlement to disability benefits, if any, is limited to the period between filing the application for benefits and reaching age 65, the social security retirement age. 42 U.S.C. §§ 416(1), 423(1)(B).) Schmidt had a mild heart attack in 1976. At

the time he was a senior vice president of Montgomery Ward, supervising more than a hundred retail outlets and earning in excess of $125,000 a year. Wanting a less stressful job, he took early retirement from Montgomery Ward in 1981. Between 1982 and 1986 he first was president of a subsidiary of another retail enterprise and then operated his own consulting business. He stopped working in 1986 after being hospitalized for symptoms caused by his arterial problems. Although he continues to be physically active and even plays handball, he has mild angina pectoris which his doctor believes would become frequent and severe if he returned to a high-stress executive job.

The administrative law judge who ruled that the plaintiff is not disabled was persuaded that the plaintiff could return to the sorts of job he held before he stopped working in 1986. The fact that the plaintiff continues to play handball appears to have weighed heavily with the administrative law judge. It is indeed difficult for a lay person to understand how a person could suffer from disabling heart disease yet play handball for forty minutes every week. But judges, including administrative law judges of the Social Security Administration, must be careful not to succumb to the temptation to play doctor. *Wilkins v. Sullivan*, 889 F.2d 135, 140 (7th Cir. 1989); *Bauzo v. Bowen*, 803 F.2d 917, 926 (7th Cir. 1986); *Smith v. Director*, 843 F.2d 1053, 1058 (7th Cir. 1988) (dissenting opinion); *Williams v. Bowen*, 664 F. Supp. 1200, 1208 n. 17, 1209 n. 18 (N.D. Ill. 1987). The medical expertise of the Social Security Administration is reflected in regulations; it is not the birthright of the lawyers who apply them. Common sense can mislead; lay intuitions about medical phenomena are often wrong. Attacks of angina pectoris—the chest pains that are symptoms of coronary artery disease—can be brought on by psychological stress as well as by physical exertion, The Heart: Arteries and Veins 1174 (Hurst, *et al.*, eds. 1978), and people's sensitivity to different forms of strain differs. *Id.* Moreover, "angina pectoris provoked by emotional tension will sometimes last

longer than angina pectoris provoked by effort because one cannot control emotions as easily as one can control physical activity." *Id.* at 1175. Apparently Mr. Schmidt reacts worse to the kind of psychological stress that he experienced when he held responsible managerial positions than he does to the physical exertion involved in a slow game of handball. So at least the evidence of his treating physician indicates, and there is no contrary evidence. The award of benefits to a person disabled because the emotional stress of working would exacerbate his heart condition would not even be novel. *Stewart v. Heckler*, 730 F.2d 1065 (6th Cir. 1984).

So if the administrative law judge had put all his eggs in the basket labeled not disabled from doing previous work, we would have to reverse the denial of benefits. But he did not. With support from testimony given by a job expert, he made a finding, although without elaboration, that Schmidt could find employment in a less stressful white collar job. There is little doubt that this is true. Schmidt is an experienced executive with a college degree in business administration. As he is relatively little troubled by physical exertion, he can work in a variety of sedentary jobs, provided they are not stressful. Of such jobs there is no scarcity for educated people even in their sixties, at least not so acute a scarcity as would support a finding that a person was disabled from gainful employment. *Warford v. Bowen*, 875 F.2d 671, 674 (8th Cir. 1989). It is true that white collar jobs that do not involve responsibility and hence are not stressful are, by the same token, not highly remunerative. We are speaking of such jobs as cashier in a retail store, which would be quite a comedown for a former senior vice president of one of the nation's largest retail chains. But a person is not disabled within the meaning of the Social Security Act merely because the only jobs he can obtain pay much less than his former work. The job need only exist; it need not be a job that the applicant would find attractive. 20 C.F.R. § 404.1566(c)(8). That is Mr. Schmidt's position, as ade-

quately if scantily found by the administrative law judge as an alternative ground for his decision, and on that ground the judgment of the district court affirming the denial of benefits must be

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 11, 1990

BEFORE

Hon. Richard J. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

GEORGE W. SCHMIDT,	)	Appeal from the United
	)	States District Court for
Plaintiff-Appellant,	)	the Northern District of
	)	Illinois, Eastern Division.
No. 89-3766 v.	)	
	)	No. 88 C 4964
LOUIS W. SULLIVAN,	)	
Secretary of Human Services	)	James F. Holderman, Judge.
	)	
Defendant-Appellee.	)	

ORDER

On October 15, 1990, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

The motion by the plaintiff-appellant to file a response to the defendant-appellee's reply is DENIED as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE SCHMIDT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 88 C 4964
	)	
OTIS R. BOWEN, M.D.,	)	
Secretary of Health and	)	Dated,
Human Services	)	May 19, 1989
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN:

Plaintiff George W. Schmidt instituted this action pursuant to 42 U.S.C. Sec. 1383(c)(3) for review of the final decision of the Secretary of the Department of Health and Human Services (the "Secretary") denying plaintiff's application for a period of disability and disability insurance benefits. The parties have filed cross-motions for summary judgment. For the reasons set forth below, the Secretary's motion is granted.

BACKGROUND FACTS

Plaintiff filed his application for disability benefits on October 17, 1986, claiming that he had been unable to work since March 28, 1986 due to a cardiac condition, high blood pressure, and an 80%-blocked right carotid artery. (A.R. 89). The Social Security Administration denied the application initially and on reconsideration after determining that, although plaintiff does suffer from higher-than-normal blood pressure

and an 80%-blocked right carotid artery, he was able to return to his past job as a corporate executive. Plaintiff exercised his right to a de novo review of his claim at a hearing before an administrative law judge. The plaintiff, represented by counsel, and a vocational expert testified at the hearing. On January 29, 1988 the ALJ affirmed the previous denial of disability benefits. The ALJ found that plaintiff could perform his past relevant work and, even if he could not return "to prior executive jobs, the vocational expert testified that he would have transferable skills to somewhat less stressful jobs." (A.R. 21.)

Plaintiff appealed the decision of the ALJ to the Appeals Council, which denied his request on May 17, 1988. The ALJ's decision thereby became the final decision of the Secretary in this matter. Plaintiff filed his complaint in this court on June 7, 1988.

A. *Medical Evidence.*

Plaintiff began to experience chest pain in 1976. In March of 1986 plaintiff was hospitalized for a transient cerebral ischemia attack and angina pectoris. (A.R. 140.) A cerebral angiogram performed on April 7, 1986 revealed approximately 70% stenosis in the proximal right internal carotid artery. (A.R. 163.) An ultrasound revealed a 90% occlusion of the right carotid artery. (A.R. 143.)

On September 19, 1986 plaintiff underwent a treadmill stress test because of chest discomfort. The report from Northwestern University's McGaw Medical Center concluded that the state of plaintiff's physical fitness was normal. (A.R. 165.) Plaintiff was able to achieve 90% of his maximum heart rate and the report concluded that his functional capacity was above average by more than 20%. (Id.) A medical report from plaintiff's treating physician Martin Brandfronbrener, M.D., dated November 2, 1986 stated that plaintiff suffered angina two or more times a week; the angina pain would last from five to fifteen minutes. A report by another of plaintiff's

treating physicians, Charles Nadler, M.D., dated April 16, 1987 stated that plaintiff suffers from anxiety-depression, angina and possible transient ischemia attacks. Regarding plaintiff's heart condition, Dr. Nadler wrote that plaintiff has experienced "several years of angina but [patient] plays handball actively." (A.R. 189.) Doctor Nadler also noted that plaintiff suffers light chest pain with stress, that nitroglycerin offers him some relief, and that plaintiff can play handball with few symptoms. He stated that plaintiff suffers from "'job burn out'" and has trouble dealing with stress, leading to exhaustion. (A.R. 190.) The doctor stated that plaintiff can do work-related activities such as sitting, standing, lifting and travelling "except for extreme exertion." (Id.)

Plaintiff was evaluated on June 9, 1987 for tingling and pain in the right arm. A report by Dr. Howard Simon, M.D. indicated that plaintiff suffers from carpel tunnel syndrome in his right arm. He was treated conservatively with a splint for his hand. (Plaintiff was reexamined a month later and was "somewhat improved" at that time.) (A.R. 22.)

Plaintiff also has cervical osteoarthritis. (Id.) A x-ray of plaintiff's cervical spine shows "degenerative changes at C3-C4 with minimal narrowing of the disc space and some degenerative anterior spur formation at C5-C6 with no significant narrowing of the disc space. There is no compression deformity." (A.R. 259.)

On July 30, 1987 plaintiff underwent a thallium stress test and was again able to achieve greater than 90% of maximum predicted heart rate. (A.R. 222.)

Finally, plaintiff was referred by his attorney to William P. Reich, Ph.D., a clinical psychologist for an evaluation of Mr. Schmidt's intellectual and emotional functioning. Mr. Schmidt spent 90 minutes with Dr. Reich and took standardized intelligence and personality tests. Dr. Reich determined that:

> Mr. Schmidt's overall intelligence falls in the normal range. His practical judgment

> and understanding are well above average. The significant difference in Mr. Schmidt's Verbal and Performance scores, however, is suggestive of brain disfunction. He appears to be mild[ly] to moderately impaired in tasks involving coordination of visual-spatial and motor functions.

(A.R. 239.)

Dr. Reich further observed:

> Mr. Schmidt's MMPI results indicate a rather severe emotional disturbance centering around a strong somatic reactivity to stress. He tends, in other words, to express emotional problems through physical distress. . . . Mr. Schmidt is very concerned with his physical problems. . . . He is more concerned with physical problems than 93% of the population. In addition, he shows strong obsessive compulsive symptoms . . . .

(A.R. 240.)

Dr. Reich concluded:

> Mr. Schmidt is an individual who has had a lifelong compulsive need to excel in all endeavors, and to demonstrate strength and resilience in the face of all challenges. He is a classic "Type A personality" . . . It appears that Mr. Schmidt has suffered some mild brain damage, possibly as a result of the transient cerebral ischemia he suffered in 1986. The degree of difficulty indicated in the WAIS-R and the TRAILS tests is not sufficient in itself to cause any marked impairment in his practical

> functioning. However, given his need to excel and demonstrate the ability to rise above all challenges, his reaction to his subjective awareness of even a subtle decrement in performance is to become frustrated and anxious. The frustration and anxiety further impair his performance, and a vicious cycle ensues resulting in impaired concentration and memory, increased anxiety and stress. . . . If he were to return to work, it is quite possible his compulsive style would emerge even more strongly, causing a serious threat to his health.

(A.R. 240-41.)

B. *The Hearing Testimony.*

Mr. Schmidt was 62 years old at the time of the administrative hearing. He has a college degree in business administration. (A.R. 37.) He has served extensively in the armed services. From 1974 through 1981, plaintiff worked six days a week as a senior corporate executive in retailing, earning in excess of $125,000 per year. (A.R. 102.) Plaintiff stated that he left this position because of feelings of "personal inadequacy for the responsibilities that I had at that time...." (A.R. 38.) He wanted to "slow [his] pace through consulting" and took advantage of an early retirement program. After leaving retailing, plaintiff worked from January through November 1982 as president of a Wick's subsidiary. (A.R. 41.) At this job he would sometimes work very long house and would consequently experience "severe angina pains and very severe fatigue." (A.R. 43.) Plaintiff then did independent consulting from 1983 until 1986. On March 29, 1986 plaintiff experienced a transient cerebral ischemia attack, *i.e.* stroke, and stopped working at that time.

Mr. Schmidt testified that when he left retailing in 1981 he was experiencing angina. At his hearing plaintiff testified that he currently suffers from "very severe angina, which comes on very quickly with modest work, or what I call modest decision making," osteoarthritis, headaches, and carpal tunnel syndrome in his right arm. (A.R. 47, 55.) Mr. Schmidt testified: "[I]n my life, if there's conflict, I'll have angina pains, angina." (A.R. 48.) Plaintiff gets relief from the angina with nitroglycerin pills, and takes Naprosyn for relief from the osteoarthritis.

Plaintiff testified that he is "physically quite strong. . ." (A.R. 52.) Mr. Schmidt does passive exercises, rides a stationary bicycle three times per week for between fifteen and twenty-five minutes per session, and goes to the YMCA for water exercises. (A.R. 197.) He can stand for one to two hours at a time. Plaintiff testified that he can walk several miles, or "it may be, if I've got a lot on my mind, I may be only [able] to [get as far as] the post office, 2 blocks away." (A.R. 49.) Plaintiff is able to play handball, albeit at a reduced level of exertion, once or twice a week for thirty to forty minutes per session. (A.R. 59.)

The ALJ questioned plaintiff about memory and concentration:

> Q. Do you have any problems with memory or concentration?
>
> A. Very much with concentration.
>
> Q. And when did those problems start?
>
> A. My memory is pretty good.
>
> Q. When did you have the--when did the concentration problem start?
>
> A. Oh, that started back in, in '76, '77, '78. And it became increasingly more difficult. That's why I made the conscious

> decision to leave a very fine and high paying job. . . . (A.R. 57-58.)

In this regard plaintiff testified further:

> When you ask me mental, I didn't finish it. I, I remember big, certain things, but I can't find, sometimes, my pencil. Or I, I can't find where I put my checkbook, or I lose the bank box key, and then I blame her for it, and that's absurd. I never did that in my life.
>
> * * *
>
> I've usually been pretty orderly. You have to be organized. But if I lost a pencil or a key, I'd just get another one. It didn't bother me. I, I'd skip it. What's the difference. If I didn't catch one plane, I'd catch the next one. Now if I don't, if I miss a plane, it's the end of the world.
>
> * * *
>
> I was very good--you have to be in business--at skipping over the miniscule and getting to the important part and establishing priorities, and I no longer do that. My priorities are all out of whack.
>
> * * *
>
> I don't know whether I'm avoiding work that I think may bring on the angina, because it is painful, or whether it's mental that I don't organize it well. I don't know the answer to that. I would like someone to help me.

The ALJ queried plaintiff about his alleged need to "hold to a very restricted activity level or suffer the consequences of

rapidly declining capacity to cope mentally and physically." (A.R. 68.) Plaintiff responded:

> Well, if I just work at something for, for half an hour or 45 minutes or something, it turns, it kind of turns into a blur. And it's like, I guess it relates back to when I say I used to, I'd be a voracious reader and could read a book in a night, and now it takes me 2 or 3 weeks, because I forget where I was or what happened, and I have to go back and reread it. Same thing happens in my work. I have to--things that I could have instant recall on, I have to goback and say, where was I, and did I finish this.

(A.R. 68.) Plaintiff testified that his loss of reading speed is partially attributable to his need to get up and rest his back every 20 to 30 minutes.

The ALJ asked plaintiff whether he believed he could return to retailing with a reduced amount of stress. Plaintiff explained why he believed that he could not:

> I, I just, I just know if I did and were assigned something, it would be a problem situation, people would depend on me, and I wouldn't want to let them down. I could do an av--I, I just have never been able to do an average job. . . . I said I'm either incompetent or excellent, I'm not average . . . ."

(A.R. 63.)

Later, the ALJ questioned plaintiff about his compulsive nature:

> Q. I just wanted to ask one other thing. With--when you find yourself working at a job, do you have what they call a compulsion about things, not only your own work, but other people's?
>
> A. I'm told I do. I, I, I have, I can't--have trouble suffering mediocrity from people who can do better. I can deal with mediocre people in mediocre jobs. I think they're marvelous. They can, capable, they're giving me 100% of what they've got. But somebody who has got 100% and only gives me 70%, I have no tolerance for....
>
> Q. Was there an expression that they used with you about doing your own work and other people's?
>
> A. . . . I was a vacuum filler.

The ALJ then questioned the vocational expert about plaintiff's ability to work. The vocational expert testified that plaintiff's previous work would be classified under the generic title of corporate executive, a sedentary and highly skilled occupation. Stress is "[p]art of the animal" of corporate executiveship. (A.R. 80.) The ALJ asked the vocational expert whether, given Mr. Schmidt's angina and carpal tunnel syndrome, he could return to his past work. The vocational expert responded:

> Well, I really don't feel I have enough information in that hypothetical to give an opinion, because well, if I could break it down, I don't believe the carpal tunnel would interfere at all. But in terms of the angina, strictly from a physical functional point of view, I, I, I don't know if I have enough information to be able to given an

> opinion. From, from just an exertional point of view, it appears from that hypothetical that he'd be able to do that. But I really don't think I have enough information to give a good opinion.

(A.R. 81.)

The ALJ queried:

> Q. Alright. Would that--if we were to find for the moment that, that the current frequency of 4 or 5 times a week [is correct, but] . . . in the light of the testimony that it does not interfere with the, does not preclude the handball, would that be enough to answer the question?
>
> A. Well, again, I don't really have a clear understanding from that hypothetical as to what kind of symptomology the angina brings on. I don't, I still don't think I can answer it. . . . [But,] I could answer it in that if the angina brings on pain, and that it reduces his ability to concentrate, and then I would say no, he would not be able to perform those jobs.
>
> Q. Alright. And then what if it does not significantly reduce the ability to concentrate, and it is, and at the frequency--and at that frequency?
>
> A. Well, I would say again, I don't really know the symptomology, but if it was just short pain, chest pain several times a week, I would have to say he would be able to do that job.
>
> Q. Alright. what if it's 4-5 times a week?

A. And it was not of a severity to interfere?

Q. And does not significantly reduce concentration?

A. Then I would have to say he would be able to do the work.

(A.R. 82.)

The ALJ then questioned the vocational expert about Mr. Schmidt's residual functional capacity to perform other work:

Q. Alright. If I were to find that Mr. Schmidt is unable to do the prior work because it was extraordinarily or highly stressful, would he have any skills or semi-skills transferable to other work?

A. Well, yes, he has many skills that [are] transferable to other work. But all of it would be in the, the business area. I would say to lesser degrees of management. It's a little hard to explain, but the same type of work, but not to the degree in which he was performing it, not at the level.

Q. Alright. Would there be jobs of that nature, and also taking into consideration all the other hypothetical findings, that he could do and exist in significant numbers?

* * *

A. Well, I would have to give the same answer I've given before with that. I stated that he would be able to perform that work, given that hypothetical.

* * *

> Q. There's a--in other words, if the testimony is fully credited, there is a personality trait here. . . such that the individual cannot do as much as paint a wall in his house without getting obsessed with doing it perfectly?
>
> A. Exactly. There's quite a compulsion there to do an excellent job, and even a, a simple task would, would be stressful in terms of wanting to do it perfectly.
>
> Q. Alright. Finally if I were to credit all of the testimony fully, would you have an opinion as to whether or not he could either do any of the prior work, or transfer skills to other work that existed in significant numbers?
>
> A. Yes, I do.
>
> Q. And what would that opinion be?
>
> A. No, he would not be able to.

(A.R. 84-85.)

Finally, Mr. Schmidt's attorney also questioned the vocational expert:

> Q. If you include in hypothetical number 1 that the angina occurs 4 or 5 times a week, but it lasts for, as he testified, 8 minutes now, and he has to go lay down or stop whatever he's doing, would it be reasonably expected that a person in, in a management position who has to deal with boards of directors and clients and deal on the phone and in

person with people, be reasonably expected that he could perform substantial gainful activity, taking 4 or 5 8 minute breaks a week? Just saying to the board of directors excuse me, but I'm getting chest pain, I've go to go lie down for 8 minutes. I'll be back in 8 or 10 minutes.

A. Well, exactly. That would be the problem, even though it's not a long period of time over the amount of a week, the fact that it comes and goes and you don't know when it's coming, and you're constantly in a position where you could be in a very, very important meeting or whatever, I would say yes, that would definitely interfere with the ability for that job.

Q. And let's assume instead of 4 or 5 times a week, as he testified that when he was working, it was 4 or 5 times a day, although it didn't last for 8 minutes, it was more like 2 or 3 or 4 minutes. Would your answer be--

A. It would be the same.

(A.R. 85-86.)

DISCUSSION

At issue in this appeal is whether the ALJ's determination that plaintiff can return to his past relevant work is supported by substantial evidence. As the Seventh Circuit has stated, a determination of whether a claimant is able to perform his or her former occupation requires the factfinder to decide whether the claimant retains the residual functional capacity to perform either the actual functional demands in job

duties of a particular past relevant job; or the functional demands and job duties of the occupation as generally required by employers throughout the national economy. *Arbogast v. Bowen*, 860 F.2d 1400, 1403 (7th Cir. 1988). Plaintiff asserts that the ALJ (1) made selective use of the evidence before him; (2) made selective credibility determinations without adequately articulating the reasons therefor; and (3) improperly discounted the effect of stress and pain on plaintiff's ability to work. "As a collective result of these errors," plaintiff submits that the Secretary failed to compare his past relevant work to his present capabilities. *Arbogast, supra*, 860 F.2d at 1404.

1. *Selective Use and Distortion of the Evidence.*

First, plaintiff claims that the ALJ made selective use of the evidence, in some cases distorting the record, in making his determination that plaintiff is able to return to work. For example, plaintiff argues, the ALJ "misstates the testimony regarding the frequency of claimant's angina pains," incorrectly "states that the claimant is not limited to any significant degree in concentration," and misconstrues Dr. Nadler's statements in the cardiac reports. (Plaintiff's Mem. in Support, pp. 14-15.)

The court concludes that the opinion of the ALJ does not reveal any distortion of the medical evidence or the testimony presented to the ALJ. On the contrary, the ALJ "considered and discussed the important evidence, including all medical evidence that is credible, supported by clinical findings and relevant to the question at hand. . . ." *Anderson v. Bowen*, 868 F.2d 921, 924 (7th Cir. 1989) (citations and internal punctuation omitted).

2. *Selective Credibility Determination.*

Next, plaintiff argues that:

> [T]he ALJ selectively credits testimony throughout his decision to reach the conclusion that Plaintiff can return to his prior job as a high level executive, an obviously stressful position. While the ALJ

> states in his "Findings" that "claimant's testimony was not full credible, "he fails to articulate what is credible and what is incredible, let alone state any reason for his distinction.

(Plaintiff's Mem. in Support, p. 16.)

The court believes that the ALJ's opinion adequately states the reasons why the ALJ did not fully credit plaintiff's testimony. For example, the ALJ did not completely believe plaintiff's complaints about lack of concentration. The ALJ reasoned that "[t]he claimant's testimony of reading complicated books and assisting people in financial planning belie this." (A.R. 21.)

The court believes, moreover, that the medical evidence, reviewed at length by the ALJ, supports the ALJ's credibility determination. Both of the plaintiff's stress tests demonstrated that plaintiff's functional capacity was above average by greater than 20%. Dr. Nadler, one of plaintiff's own treating physicians, noted that plaintiff has experienced "several years of angina but [the patient] plays handball actively." (A.R. 189.) The inference that the ALJ obviously drew from Dr. Nadler's report--an inference that this court believes was justified in light of the record--is that plaintiff's complaints of physical distress were exaggerated to some degree. The report of the consulting psychologist Dr. Reich, also supports the ALJ's conclusion to discount plaintiff's testimony. Dr. Reich's diagnostic impression of plaintiff was "[u]ndifferentiated somatoform disorder . . . involving chiefly an exaggerated reaction to physical complaints beyond that which would be expected on the basis of physical findings alone." (A.R. 24.) Dr. Reich stated that "Mr. Schmidt might profit from psychotherapy aimed at the exploration of his need to excel and his difficulty in expressing anger and frustration." *Id.*

In short, the court finds that the ALJ adequately stated the reasons why he did not find plaintiff's testimony fully credible. The ALJ's reasoning is apparent from his decision:

an extended discussion of the reasons for his credibility determination was therefore unnecessary. *Arbogast, supra*, 860 F.2d at 1406, citing *Imani v. Heckler*, 797 F.2d 508, 511 (7th Cir.) *cert. denied*, 479 U.S. 988 (1986).

3. *Effect of stress and pain.*

Plaintiff argues that the ALJ erred by improperly discounting the effect of stress and pain on plaintiff's ability to work. Plaintiff argues:

> Here, where the angina was well documented and the treating doctors agreed that stress would be harmful, Plaintiff clearly met his burden of showing that he could not return to his past work. Following the sequential analysis, the Secretary must prove that the Plaintiff could nevertheless perform other jobs in the national economy despite his disability.

Since, plaintiff argues, he "must avoid all stress, it is highly unlikely that he could work even in sedentary and low-stress jobs, since *some* stress would be encountered." (Plaintiff's Mem. in Support, p. 21.) In support of his argument, plaintiff relies substantially on the opinion stated by Dr. Reich that:

> given [plaintiff's] need to excel and demonstrate the ability to rise above all challenges, his reaction to his subjective awareness of even a subtle decrement in performance is to become frustrated and anxious. The frustration and anxiety further impair his performance, and a vicious cycle ensues resulting in impaired concentration and memory.
>
> Mr. Schmidt's lifelong style has been to work compulsively. The more severe the challenge, the harder he pushed. Unhappily, that approach has probably contributed to his health problems. He continues that approach

> today, despite his awareness that the stress he places on himself may further endanger his health. If he were to return to work, it is quite possible his compulsive style would emerge even more strongly, causing a serious threat to his health.

(A.R. 241.)

The court concludes that the ALJ's determination that plaintiff can return to his past relevant work--despite the effect of stress--is supported by substantial evidence.

Dr. Nadler's cardiac report of November 13, 1986 indicated that plaintiff's angina pains are experienced as a "dull ache" and "heaviness" for less than 15 minutes several times per week. (A.R. 185.) His cardiac report of April 16, 1987 indicated that plaintiff's angina is "pressure-like," lasting a "few seconds." In this second report Dr. Nadler twice noted that despite his angina, plaintiff plays handball "with few symptoms" and can do all work-related activities except for extreme exertion. (A.R. 189-190.)

The most substantial medical evidence in the record regarding the effect of stress on plaintiff's ability to work is Dr. Reich's speculative statement: "If he were to return to work, it is quite possible his compulsive style would emerge even more strongly, causing a serious threat to his health." (A.R. 23.) The court believes that the ALJ properly decided that plaintiff could return to his previous work in light of the absence of any medical evidence establishing more than a possibility that stress was likely to lead to disabling angina.

Finally, the court notes that the plaintiff's own testimony supports the ALJ's conclusion. When the ALJ asked plaintiff if he could return to work as a corporate executive, plaintiff responded:

> I could do an av--I, I just have never been able to do an average job. . . . I'm not average.

The social security regulations do not consider a person disabled if he can do only an "average" job at his work rather than an excellent job. Plaintiff's compulsion to be the best at what he does not render him disabled.

CONCLUSION

Because the decision of the ALJ, adopted by the Secretary as his final decision in this matter, is supported by substantial evidence, the defendant's motion for summary judgment is GRANTED. Plaintiff's cross-motion for summary judgment is DENIED.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: May 19, 1989

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS
DECISION

IN THE CASE OF:
CLAIM FOR:

Period of Disability and *George Schmidt Disability Insurance Benefits*
(Claimant)
489-24-0186
Dated: January 29, 1988
(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security

Administration Regulations No. 4. The regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. *If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.*
Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors

> including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

The preceding paragraphs reflect the current provisions of the Social Security Act and Regulations. However, as the result of a decision issued July 30, 1985 by the United States Court of Appeals for the Seventh Circuit in the case of *Edna Johnson, et al. v. Heckler*, 769 F. 2d. 1202 (7th Cir, 1985), the undersigned will not employ step 2 (the not severe test) of the sequential evaluation process in evaluating the claimant's alleged disability.

SUMMARY OF THE EVIDENCE AND EVALUATION THEREOF

On October 17, 1986, the claimant filed an application for period of disability and disability insurance benefits under Section 216(i) and 223 of the Social Security Act, alleging he became disabled on March 28, 1986 due to a cardiac condition, hypertension and a blocked right carotid artery. After the application was administratively denied, the claimant filed a

timely request for a hearing. A hearing was held on October 8, 1987. The claimant appeared and testified and was represented by attorney Frederick Daley. Also present and testifying was vocational expert Susan Entenberg, appearing at the request of the Administrative Law Judge.

The claimant testified that he was born on April 12, 1925. He completed college and has a B.S. degree in Business Administration. He fought in both World War II and Korea. Testimony regarding occupational history reveals that from 1972 to 1974, the claimant was a business executive in charge of sales and profits for seventeen retail stores. Exertionally, he was required to walk four hours, stand three hours, sit two hours and lift up to ten pounds. From 1974 to 1981 he worked at Wards as a Senior Vice President and Regional General Manager in charge of sales and profits of approximately one hundred retail stores. This job was very stressful and required working up to sixty hours a week. He quit assertedly due to "personal inadequacy" for responsibility, angina, and the company having offered an early out. From January 1982 to November 1982 the claimant worked as a manager in a retail food and drug chain, forty to fifty hours a week. He was in charge of the operations of three hundred and forty six supermarkets. Chest pain was not a problem. Exertionally, he was required to do a lot of walking and standing and lift. The claimant states that he was fired from this job. In 1983 to March 1986 the claimant worked as an independent consultant, assisting executive management in venture capital troubled companies. He quit due to a hospitalization.

The claimant further testified that he suffers from chest pains four to six hours a week both with work and at rest. They are sharp and never occur at night. They do occur with decision making. He also has osteoarthritis but commented that if this was his only impairment, he would be able to work. He also had a transient cerebral ischemic attack immediately prior the hospitalization. He also suffers from headaches and backaches.

He stated that he can stand only one to two hours. He can walk several miles before he experiences angina pain. He can sit twenty to forty minutes. (However, the Administrative Law Judge notes that the claimant sat for an hour and half at the hearing). Bending and stooping is very painful. He stated that he was not able to do things with the same effect and speed as in the past. He has trouble balancing his checkbook. If he works on something for half an hour to forty-five minutes it turns into a blur. Currently, he is reading a complicated book, however, he cannot sit still due to his back pain. He does not have as many headaches as he had when he worked. However, if he feels frustrated or let down, he will experience a headache. Recently, he has had a lot on his mind--such as getting things in order. He does not fear dying, he explained, but he does fear dying quickly within the next year. He states that his blood pressure fluctuates and is not under control. Last Monday it was 180/116. He stated that he is quiet strong. However, he experiences left arm pain with exertion and his right hand has carpal tunnel syndrome. He is nervous and must take a sleeping pill at night.

The claimant further testified that he lives in a townhouse with a companion who is ill. He is separated from his wife who is a ex-alcoholic. He cannot keep up with the yardwork. During the day he tries to read but loses concentration. He is interested in the news. He is trying to get a will and do things to take care of his personal life. His memory is good but he has concentration problems. He gets along with people. He plays handball once or twice a week for thirty to forty minutes. He was told that he was depressed by his doctor. He has helped elderly neighbors and friends with financial problems. He is irritable. He recently turned down a good job offer due to his health.

The medical evidence reveals that on June 9, 1976, the claimant was admitted to Ingalls Memorial Hospital due to chest pain. An EKG revealed only repolarization changes.

The diagnosis upon discharge on June 13, 1976 was angina pectoris (Exhibit 13).

On December 21, 1984 the claimant underwent a selective coronary angiography. The right arteries had less than a thirty percent narrowing. In the left anterior descending artery the proximal segment had less than thirty percent narrowing, however, the mid segment revealed fifty to sixty percent narrowing. This suggested a left ventricular hypertrophy (Exhibit 14).

On March 29, 1986 the claimant was admitted into Northwestern Memorial Hospital due to numbness and tingling of the right arm. The claimant had a normal EEG both in awake and asleep. The CT scan was negative. A bilateral carotid left vertebral angiogram revealed approximately seventy percent stenosis in the proximal right internal carotid artery. The Echocardiogram revealed evidence of concentrically hypertrophied left ventricle, with dilation of the aorta at the level of the sinuses and ascending aorta. The left atrium was of normal size. Ultrasound revealed ninety percent occlusion of the right carotid artery. The claimant was discharged on April 2, 1986 with a diagnosis of transient cerebral ischemia attack and angina pectoris (Exhibit 15).

On June 9, 1986 the claimant was examined by Dr. Simon due to a tingling pain in his right arm. The neurological examination revealed signs of carpal tunnel syndrome. An EMG reveal cervical radiculopathy in the right at the levels of C8-T1. The EEG was within normal limitations. The claimant was treated conservatively and improved. The diagnosis was carpal tunnel syndrome on the right, improved with treatment; cervical radiculopathy secondary to cervical arthritis; and significant carotid stenosis on the right. The prognosis was guarded (Exhibit 30).

On August 12, 1986, an x-ray of the cervical spine revealed degenerative changes at the C3-C4 with minimal narrowing of the disc space and some degenerative anterior spur formation

at C5-C6. There was also small, bilateral posterior osteophytes at C5-C6 and C6-C7 and some posterior osteophytes at C3-C4 on the left. There was calcification of the ligamentum nuchae at C4-C5 (Exhibit 32).

On September 19, 1986 the claimant had a treadmill thallium stress test. He was able to complete 12 minutes of exercise. His functional capacity was rated above average and the impression was possible ischemia (Exhibit 16).

After a examination on September 4, 1986, Dr. Brandfronbrener filled out a cardiac report. The diagnosis was coronary arthrosclerosis. The last three blood pressure readings were 160/100 on September 4, 1986; 128/90 on April 10, 1986; and 110/70 on February 11, 1985. The doctor indicated that the claimant had a myocardial infarction in 1976 and in December 1984, a balloon angioplasty. The claimant has chest pains twice a week at rest and upon exertion. The pain is a substernal pressure which lasts 5 to 15 minutes. The doctor indicated that the claimant was limited to mild activity (Exhibit 17).

After an examination on September 29, 1986, Dr. Nadler filled out a cardiac report. His diagnosis was angina pectoris and mild hypertension. The last three blood pressure readings were 140/90 on September 29, 1986; 120/90 on May 12, 1986; and 120/86 on June 24, 1986. He indicated that the claimant has not had a myocardial infarction. He has chest pains located in the substernal with exertion and relieved by rest or nitroglycerin. The claimant has left arm pain with exertion and some pain with walking and driving. An EKG revealed ST/T wave changes (Exhibits 18 and 19).

After a examination on February 19, 1987 Dr. Nadler filled out a cardiac report. His diagnosis was anxiety depression, angina, and possible transient ischemic attack. The claimant's last three blood pressure reading were 130/90 on February 19, 1987; 104/70 on November 24, 1986; and 150/100 in March 1986. An angiogram in December 1984 revealed sixty percent

narrowing of LAD. The claimant has chest pain with stress which is relied with nitroglycerin. He is able to play handball with few symptoms. The doctor indicated that the claimant could do most activity except for extreme exertion (Exhibit 21).

On June 3, 1987 the claimant was visited by a psychiatric social worker in his home. The claimant indicated that he is separated from his wife and currently lives with a female companion who suffers from cancer. Daily, he walks six to twenty blocks. He does passive exercises and three times a week rides a stationary bicycle from 15 to 45 minutes. He goes to the YMCA for water exercises and the steam room. He cooks, watches television, reads and takes care of his companion (Exhibit 23).

On July 30, 1987 a thallium stress test revealed no definite evidence of exercise induced ischemia, however, there was diminished perfusion in the apical region. The claimant was able to exercise for eleven minutes. This indicated that since the stress test in September 1986 that the claimant's functional capacity has diminished and ST deviations have been accentuated (Exhibit 31).

On September 11, 1987, Dr. Nadler filled out a physical capability evaluation. He indicated that the claimant could sit six hours, stand one hour, walk one hour and lift/carry twenty-five pounds. He could perform simple grasping and find manipulations with both his hands, however, he could not use his hands to push or pull arm controls. The doctor indicated that the claimant has angina pectoris at rest and with moderate exertion. He indicated that stressful situation precipitate his angina (Exhibit 32).

On October 7, 187 the claimant had a psychological examination at the request of his attorney. The psychologist reported that the claimant was cooperative and pleasant, but demonstrated considerable anxiety over his physical and intellectual impairments. He was oriented and his memory was normal. On testing, the claimant received a verbal IQ of 121,

performance I.Q. 95, and a full scale I.Q. 110. This indicated functioning within the normal range of intelligence. It further indicated, according to this psychologist, that the claimant was mildly to moderately impaired with tasks involving coordination of visual-spatial and motor functions. His memory functioning was well above average. The personality testing reportedly revealed severe emotional disturbance centering around a strong somatic reactivity to stress. The psychologist stated that if the claimant returned to work, it was quite possible that his compulsive style would emerge causing serious threat to his health. The impressions were personality disorder with obsessive and compulsive features and undifferentiated somatoform disorder.

The psychologist also filled out a psychiatric review technique form indicating an organic mental disorder under Listing 1.02, a somatoform disorder under 112.07, and a personality disorder under 1.08. However, according to the psychologist, the claimant did not fully meet the listed disorders because he did not meet the functional limitations to the degree required. The psychologist indicated that the claimant has no restrictions of activity of daily living; no difficulty in maintaining social functioning; frequent deficiencies of concentration persistence or pace resulting in failure to complete tasks in a timely manner; and insufficient evidence as to episodes of deteriorations or decompensation in work or work-like settings. Therefore, the claimant did not have the functional limitations necessary to meet the listings (Exhibit 32).

The Administrative Law Judge called the vocational expert to testify. She testified that she had review the medical evidence and listed to the testimony. The Administrative Law Judge first asked the vocational expert to assess the claimant's past relevant work in terms of skill and exertion levels. The vocational expert testified that the claimant was a corporate executive, which is a highly skilled job, with a high amount of stress, and which is sedentary in exertion. The Administrative Law Judge then asked the vocational expert to consider a

hypothetical 62 year old man with this experience, a college education, left handed, who has right carpal tunnel syndrome which does not limit his functioning, and angina but having the ability to play handball as testified to at the hearing. Given these findings would the individual be able to perform the job of corporate executive? The vocational expert opined that if the angina does not significantly reduce his concentration, he could.

The Administrative Law Judge then added an addition finding: that if due to the high stress the individual could not perform the job, were there other jobs in the economy that the person could perform? The vocational expert opined that a lesser degree of manager would be within the individual's capabilities as he would have highly marketable skills.

Lastly, the vocational expert was asked to assume it were found that all of the claimant's impairments and limitations that he testified to were found true. The vocational expert opined that if the claimant had angina 4-5 hours a week lasting eight minutes, it would so interfere with his ability to work that he could not perform any work activity.

The evidence reveals that the claimant has not engaged in substantial gainful activity since March 28, 1986. He alleged the inability to work due to a cardiac condition, hypertension and a blocked right carotid artery. These impairments as well as the mental impairment, however, do not meet or equal the severity of any impairment listed in Appendix 1. to Subpart P, Regulation No. 4, whether considered singularly or in combination. Because of the evidence of a mental impairment, the Administrative Law Judge has attached hereto and filled out the Psychiatric Review Technique form. The record shows that the claimant has a disturbance of mood, accompanied by a depressive syndrome as evidenced by a sleep disturbance, decreased energy, feelings of guilt and difficulty concentrating or thinking. However, the affective disorder does no significantly limit the claimant's functioning which includes a wide range of activities, including reading a complicated novel,

weekly handball games, and helping people with financial planning.

The evidence reveals that the claimant has been hospitalized for angina pectoris on several occasions (Exhibits 13, 15). A coronary angiogram on December 21, 1984 suggested left ventricular hypertrophy (Exhibit 14) on March 29, 1986 the claimant had a transient cerebral ischemia attack (Exhibit 15). He also has been diagnosis as having right carpal tunnel syndrome on June 9, 1986, but it improved with conservative treatment (Exhibit 30). The claimant was able to exercise twelve minutes on September 19, 1986 (Exhibit 16). Dr. Brandfronbrener limited the claimant to mild activity on September 4, 1986 (Exhibit 17). On February 19, 1987 Dr. Nadler noted that the claimant was able to play handball with few symptoms and restricted the claimant only from work requiring extreme exertion (Exhibit 21). A stress test on July 30, 1987 revealed no evidence of exercise induced ischemia (Exhibit 31). Dr. Nadler on September 11, 1987 indicated that the claimant can sit six hours, stand one hour, walk one hour and lift/carry up to twenty-five pounds. However, he added that stressful situations precipitate angina (Exhibit 32). A psychologist who examined the claimant's at counsel's request, on October 7, 1987 opined that if the claimant worked, it could be a serious threat to his health due to his compulsiveness (Exhibit 32).

The record indicates that the claimant has arthritis (Exhibit 32) but that it does not limit his ability to perform his past relevant work. He also has right carpal tunnel syndrome, but it does not limit the claimant who is left handed. The Administrative Law Judge does not agree with the assessment by the psychologist who claimant saw at the request of counsel that the claimant is limited to any meaningful degree in concentration (Exhibit 32). The claimant's testimony of reading complicated books and assisting people in financial planning belie this. The Administrative Law Judge finds that

the claimant can perform his past relevant work. Further, even if he could no longer return to prior executive jobs, the vocational expert testified that he would have transferrable skills to somewhat less stressful jobs.

Since the claimant has the ability to perform his past relevant work, he is not disabled for Social Security purposes.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on March 28, 1986, the date the claimant stated he became unable to work, and continues to meet them through December 31, 1989.

2. The claimant has not engaged in substantial gainful activity since March 28, 1986.

3. The medical evidence establishes that the claimant has right carpal tunnel syndrome, arthritis, angina pectoris and an affective disorder, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony was not fully credible.

5. The claimant has the residual functional capacity to perform work-related activities except for work involving extreme exertion (20 CFR 404.1545).

6. The claimant's past relevant work as corporate executive did not require the performance of work-related activities precluded by the above limitation (20 CFR 404.1565).

7. The claimant's impairments do not prevent him from performing his past relevant work.

8. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(e)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on October 17, 1986, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ John L. Mondi
John L. Mondi

Administrative Law Judge
January 29, 1988

Portions of the Transcript of Plaintiff's Social Security hearing held on October 8, 1987 in Chicago, Illinois before the Administrative Law Judge

Questions asked by Plaintiff's counsel and answers given by Plaintiff (located in Administrative Record at page 65).

Q. Over the past 2 years, have you noticed any changes in yourself as far as controlling your temper or--

A. Yeah. I don't--

Q. --being impatient--

A. I was very controlled. I was always a very, very controlled. I was called the iceberg. And you have to be controlled in a major situation or in combat. I was in very severe combat.

Q. You've always been--prided yourself on being a very, kind of cool, collected, kind of controlled person?

A. Yes. I, I was given that, going back in service. I got the combat patrols. I do have, I'm not bragging, complaining, I have the Silver Star, I have a Bronze Star, I have other commendations. And, and I didn't earn it, the guys with me earned it, but I was called upon to take patrols out, because the other--some of the other officers didn't--they'd goof off, to tell you the truth. They wouldn't do the job.

Q. Over the past 2 years has that changed, that control?

A. I don't have control. I'm concerned. I'm concerned about holding my family together. I, I, I say things to

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> my, my legal wife that I don't mean. I did the other night. I say things to the woman I adore, she has her severe problems with cancer. Mayo has told her 9 years ago she wouldn't live a year. And since then, she's gotten additional cancers, had bone marrow transplants, has leukemia, and still going. She's the last person in the world I should scream at because I can't find something.

Questions asked by Administrative Law Judge and answers given by Vocational Expert (located in Administrative Record at pages 82-84).

> A. --as being sedentary, but yes, of course, there was a lot of moving around. But because you tend to be at a desk and using your mind more than anything, they tend to say that it is sedentary.
>
> Q. Alright.

ATTY: Judge, with the angina, could I just make a statement? I think he said when he was working it was about 4 or 5 times a day, the latter few years. And now it's 4 or 5 times a week, with the lower stress.

> Q. Alright. Would that--if we were to find for the moment that, that the current frequency of 4 or 5 times a week, except--but with the also in the light of the testimony that it does not interfere with the, does not preclude the handball, would that be enough to answer the question?

A. Well, again, I don't really have a clear understanding from that hypothetical as to what kind of symptomology the angina brings on. I don't, I still don't think I can answer it.

Q. Well, it's somewhat difficult to pose a question--

A. Yes, I know.

Q. --because I'm, the testimony of the angina was that it can be at rest, it can be with exertion.

A. Right. I, I, I could answer--

Q. And also that it was aggravated in non-exertional situations.

A. Right. I could answer it in that if the angina brings on pain, and that it reduces his ability to concentrate, and then I would say no, he would not be able to perform those jobs.

Q. Alright. And then what if it does not significantly reduce the ability to concentrate, and it is, and at the frequency--and at that frequency?

A. Well, I would say again, I don't really know the symptomology, but if it was just short pain, chest pains several times a week, I would have to say he would be able to do that job.

Q. Alright. What if it's 4-5 times a week?

A. And it was not of a severity to interfere?

Q. And does not significantly reduce concentration?

A. Then I would have to say he would be able to do the work.

Q. Alright. If I were to find that Mr. Schmidt is unable to do the prior work because it was extraordinarily or highly stressful, would he have any skills or semi-skills transferable to other work?

A. Well, yes, he has many skills that is transferable to other work. But all of it would be in the, the business area. I would say to lesser degrees of management. It's a little hard to explain, but the same type of work, but not to the degree in which he was performing it, not at the level.

Q. Alright. Would there be jobs of that nature, and also taking into consideration all the other hypothetical findings, that he could do and exist in significant numbers?

A. Given--I'm not sure.

Q. Alright. Well, the finding, it would be age, college as we indicated before, left-handed, right-handed carpal tunnel syndrome --syndrome, angina such that it does not significantly reduce the ability to concentrate, even though it occurs, and which occurs 4-5 times a week.

A. Well, I would have to give the same answer I've given before with that. I, I stated that he would be able to perform that work, given that hypothetical.

Q. And then with the additional limitation that he could not do work that--as highly stressful?

A. Oh. It's very difficult to answer, because highly stressful is such a subjective statement. I--

Q. Okay.

A. --in hearing the testimony, I, I believe that there would be stress in any position. Mr. Schmidt wants to take on, even if it were a manager of a smaller store, there would still be the stress that would, that is just inherent to management.

Q. There's a--in other words, if the testimony is fully credited, there is a personality trait here--

A. Of--

Q. --such that the individual cannot do as much as paint a wall in his house without getting obsessed with doing it perfectly?

A. Exactly. There's quite a compulsion there to do an excellent job, and even a, a simple task would, would be stressful in terms of wanting to do it perfectly.

Q. Alright. Finally if I were to credit all of the testimony fully, would you have an opinion as to whether or not he could either do any of the prior work, or transfer skills to other work that existed in significant numbers?

A. Yes, I do.

Q. And what would that opinion be?

A. No, he would not be able to.